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CHARLES ELMORE

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. [redacted] 36

THE CORN EXCHANGE BANK,

Appellant,

v.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

SPOTSWOOD D. BOWERS,
Counsel for Appellant,
No. 57 William Street,
New York City.

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Supreme Court of the United States.

OCTOBER TERM, 1928. No. 687.

THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

May it Please the Court:

The appellant in support of the jurisdiction of this Court to review the above-entitled cause on appeal respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, §344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

"APPELLATE JURISDICTION OF DECREES OF STATE COURTS; CERTIORARI. (a) A final judgment or

decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. (United States Code, Title 28, §861a), provides as follows:

"WRIT OF ERROR ABOLISHED; SUBSTITUTION OF APPEAL. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of January 31, 1928, Chapter 14, Section 2, 45 Stat., as amended by the Act of April 26, 1928, Chapter 440, 45 Stat. (United States Code, Title 28, §861b), provides as follows:

"STATUTES GOVERNING WRITS OF ERROR TO APPLY TO APPEALS. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of

exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Decree and of Application for Appeal.

The judgment and order sought to be reviewed was made and entered in the office of the Clerk of the Court of Appeals of the State of New York on the 31st day of December, 1928 (Certified Transcript of Record, pp. 1 to 3 inclusive). The petition for appeal, assignments of error and prayer for reversal were presented to the Chief Judge of the Court of Appeals of the State of New York on the 18th day of January, 1929, and the order allowing said appeal was duly signed by the Chief Judge of the Court of Appeals of the State of New York on the 18th day of January, 1929 (Certified Transcript of Record, pp. 54 to 58 inclusive).

C.

Nature of Case and Rulings Below.

The appellee, Commissioner of Welfare of the City of New York, purporting to act pursuant to Sections 921 to 925 of the Code of Criminal Procedure of the State of New York, made an *ex parte* application to and obtained from two city magistrates of the City of New York a warrant of seizure directing the appellee, as such Commissioner, to take and seize all of the right, title

and interest of one Raffaele de Stefano in and to a deposit made by de Stefano with the appellant, a banking corporation organized under the laws of the State of New York, and thereafter to make an inventory and return, alleging in said application that said Raffaele de Stefano was the husband of one Mary de Stefano and the father of an infant child of said marriage and had abandoned said wife and child leaving them in danger of becoming charges upon the public, and absconding from the State of New York (Complaint and Warrant, Certified Transcript of Record, pp. 18 to 21 and Affidavits, pp. 27 to 31).

Upon the refusal of appellant to recognize the said warrant the appellee thereafter brought an action in the City Court of the City of New York, New York County, setting forth the foregoing and demanding judgment against the defendant for the sum of $2,030, the amount of the said deposit (Complaint, Transcript of Record, p. 19).

Thereupon the appellant, pursuant to the rules and statutes of the State of New York, and without pleading to the complaint, moved to dismiss the complaint upon the ground, among others, that the complaint failed to state facts sufficient to constitute a cause of action and that the plaintiff had no legal capacity to sue, in that Sections 921 and 922 of the Code of Criminal Procedure referred to in the complaint are unconstitutional under the Constitution of the United States and particularly the Fourteenth Amendment thereto in that said sections attempt to deprive persons, including the defendant, and its depositor Raffaele de Stefano of property without due process of law and, in that it appears that no process of any kind in the proceedings upon which the warrant was based were ever served upon Raffaele de Stefano or this

appellant (Notice of Motion, Transcript of Record, pp. 22-24).

Sections 921, 922 and 923 of the Code of Criminal Procedure of the State of New York are set forth in the opinion of the Appellate Term found in the Transcript of Record herein at pages 41 and 42 and in substance said sections provide that upon application of the officers therein named to two police justices, upon proof that a husband or father absconds from his wife or children leaving them likely to become charges upon the public, said two magistrates may issue a warrant authorizing said officer so applying to take and seize the property of the person so absconding and that such officer is thereupon vested with title to the property of the person proceeded against, and upon return of the warrant after seizure to the County Court of the county where such persons reside, that such Court, upon inquiring of the circumstances of the case, may confirm or discharge the warrant or seizure; and if confirmed may direct such property to be applied to the maintenance of the children or spouse of the person absconding.

It will be noted that no provision is anywhere made for any notice, either constructively or otherwise, of any kind whatsoever, either before or after seizure, to the alleged absconding father or spouse or to anyone else.

The appellant's motion heretofore referred to was granted by the City Court of the City of New York (Transcript of Record, p. 14) and judgment was duly entered dismissing the complaint with costs (Transcript of Record, pp. 15, 16).

Upon appeal to the Appellate Term of the Supreme Court of the State of New York, First Department, the judgment of the City Court and the order upon which

it was based were reversed and judgment directed in favor of the appellee and against the appellant for the amount demanded in the complaint (Transcript of Record, p. 35). An opinion was written by the Appellate Term which is found at pages 40 to 46 of the Transcript of Record, holding the said statute constitutional under the United States Constitution. Pursuant to practice in such case made and provided an order was entered in the City Court of the City of New York making the order and judgment of the Appellate Term the order and judgment of the City Court of the City of New York, and a judgment was entered thereon in the City Court of the City of New York (Transcript of Record, pp. 8 to 10). Pursuant to the Constitution of the State of New York and the statutes of the State of New York an appeal was taken by the appellant directly to the Court of Appeals of the State of New York from the order and judgment of the City Court entered upon the mandate of the Appellate Term, as aforesaid; such appeal being permissible upon the ground that the only question involved in the appeal was the validity of a statutory provision of the state under the Constitution of the State and of the *United States* (Transcript of Record, Notice of Appeal, pp. 6, 7; Opinion of the Court of Appeals, p. 48).

Said appeal having duly come up for hearing and the Court of Appeals having after deliberation considered said appeal upon the merits, upon the 31st day of December, 1928, it ordered and adjudged that the judgment of the City Court of the City of New York appealed from should be and the same thereby was affirmed with costs (Transcript of Record, pp. 1 to 3).

It further appears affirmatively from the opinion of the Court of Appeals that the constitutionality of the sections of the Code of Criminal Procedure referred to in the complaint under the Constitution of the United States and particularly the Fourteenth Amendment thereto, was not only directly raised by the appellant's motion but that that was the only point considered by the Court of Appeals, with the exception of the constitutionality of the said statutes under similar provisions of the Constitution of the State of New York; and it also affirmatively appears from said opinion that that constitutional question was specifically considered and determined by the Court of Appeals; said opinion stating as follows:

> "The defendant has moved for judgment upon the ground that the statute, the basis of the warrant, is a denial of 'due process' under the Constitution of the State *and Nation* (N. Y. Constitution, Article I, §6; *U. S. Constitution; Amendment XIV*). * * * The appeal taken directly from that judgment is within the jurisdiction of this Court, a constitutional question, and no other being involved therein." (Italics ours.)

and proceeded to hold that said statute was not unconstitutional under the Fourteenth Amendment to the Constitution of the United States and affirmed the judgment directed against the appellant (Transcript of Record, Opinion of Court of Appeals, pp. 48 to 53 inclusive).

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Weller v. *New York,* 268 U. S. 319;
Ribnik v. *McBride,* U. S. Sup. Ct. Advance Sheets No. 3, Volume 277, page 350;
Wuchter v. *Pizzutti,* U. S. Sup. Ct. Advance Sheets No. 1, Volume 276, page 13;
Cohens v. *Virginia,* 19 U. S. (Wheaton) 264;
Fiske v. *Kansas,* 274 U. S. 380;
Pierce v. *Society of Sisters,* 268 U. S. 510.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the statutes referred to in Point "A" hereof in that this is an appeal from the final judgment or decree in a suit in the highest court of the State of New York in which a decision in this suit can be had and that there was drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity.

Respectfully submitted,

SPOTSWOOD D. BOWERS,
Counsel for Appellant.